Nos. 78-1872 and 79-111

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRIGHTON BUILDING & MAINTENANCE CO., WESTERN ASPHALT PAVING CO., AND THOMAS J. BOWLER, PETITIONERS

v.

UNITED STATES OF AMERICA

PALUMBO EXCAVATING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16)[1] is reported at 598 F. 2d 1101.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1979. The petition for a writ of certiorari in No.

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[1]"Pet. App." refers to the appendix to the petition in No. 78-1872. "Tr." refers to the trial transcript lodged in the court of appeals.

78-1872 was filed on June 18, 1979. A timely petition for rehearing was denied petitioners in No. 79-111 on June 26, 1979. Their petition for a writ of certiorari was filed on July 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the intent requirement in a criminal case under Section 1 of the Sherman Act is satisfied by proof that the defendants intentionally conspired to allocate work and submit collusive bids, conduct that is unlawful *per se*.

2. Whether the use of a stockholder's compelled testimony in a criminal trial against his corporation violates his Fifth Amendment rights.

STATEMENT OF THE CASE

1. On February 28, 1977, a federal grand jury sitting in the Northern District of Illinois indicted nine corporations and two persons charging them with conspiring to rig bids on five federal interstate highway construction projects, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and with 37 counts of mail fraud, in violation of 18 U.S.C. 1341. One corporate defendant pleaded guilty, one was acquitted, and the remaining nine defendants were found guilty by a jury.

The evidence, which is reviewed briefly in the court of appeals' opinion (Pet. App. A-1 to A-4), permitted the jury to conclude that the defendants entered into a conspiracy to allocate among themselves five highway construction contracts being let by the Illinois Department of Transportation in July 1975. To assure this allocation, the defendants agreed either to refrain from

bidding on particular jobs or to submit a higher "complementary" bid that would not be accepted (Tr. 2541, 1715).[2]

The five jobs involved work on the Stevenson Expressway, part of an interstate network of highways (Tr. 849), which was primarily funded by the Federal Highway Administration (Tr. 2213). The federal interstate highway program uses competitive bidding by private contractors in an effort to reduce the cost of building federal aid highways. 23 U.S.C. 112(a) to (d); Ill. Ann. Stat. ch. 127, § 132.2. (Smith-Hurd 1979 Cum. Supp.). All defendants had performed highway construction projects in Illinois in the past and were familiar with the competitive bidding procedures.[3]

In accordance with the bidding procedures prescribed by federal and state law, each defendant contractor submitted along with his bid a "bidders affidavit" that stated (Govt. Exhs. 118, 124):

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[2]The government asserted that Thomas J. Bowler and George B. Krug, on behalf of themselves and their corporations, Brighton Building & Maintenance Co., Krug Excavating Co., Western Asphalt Paving Co. and Union Contracting & Materials Co. (collectively referred to as "B-K") agreed with Ernest Bederman of Arcole Midwest Corp. ("Arcole") and Peter Palumbo, Thomas Madden, and James Corbett of Palumbo Excavating Co., Thos. M. Madden Co., and J.M. Corbett Co. (collectively referred to as "PMC") to allocate five jobs numbered 82, 83, 84, 85 and 88. Defendants agreed that B-K would be the low bidder on jobs 82-83, Arcole would be low bidder on jobs 85 and 88, and the PMC joint venture would bid unimpeded on job 84 (Pet. App. A-3). B-K later reneged on part of the agreement. Fifteen minutes before the bids were to be filed, George Krug, Sr. and George Krug, Jr. told Bederman that B-K "dumped 84," but left Arcole's jobs alone (Tr. 1718-1719, 1867, 2812-2813). B-K was low bidder on job 84, and was awarded the contract. Palumbo later told Corbett that their joint venture "somehow had been double-crossed or dumped" (Tr. 1525).

[3]Tr. 982-983, 1644, 2801-2803.

> Section 112(c) of Title 23 U.S.C. requires that this affidavit be executed as part of this proposal. * * * That [the individual or corporation submitting the bid,] its agents, officers or employees have not directly or indirectly entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with this proposal.

See Pet. App. A-6 n.1.

2. The trial of this case ended on November 2, 1977, before this Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). The B-K defendants, three of whom are petitioners in No. 78-1872, did not ask the court to give any instruction concerning specific intent (Pet. App. A-7).

An intent instruction offered by the PMC defendants requested the court to charge that, in order to convict, the jury must find that defendants had the specific intent "to violate the law."[4]

The court refused to give the requested charge, but it instructed the jury on intent this way (Pet. App. A-5; Tr. 3750-3751):

> To convict a defendant under this section of the law the Government must establish beyond a reasonable doubt that a defendant made a contract,

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[4]Requested instruction C-21 reads in pertinent part:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

> or that a defendant was knowingly and intentionally a member of a combination or conspiracy; that the purpose of the contract, or of the conspiracy was to achieve an objective that would create an unreasonable restraint of interstate commerce.
>
> It is not necessary to find a specific intent to violate the law, for the parties are deemed to have intended the necessary and direct consequences of their acts.
>
> Each defendant has been indicted for the crime of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. To convict a defendant of this crime the Government must prove beyond a reasonable doubt that he was a member of a conspiracy whose purpose was to effect an unreasonable restraint on interstate or foreign commerce.

The court later expanded on this point:

> It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. .
>
> Thus, if the jury should find beyond a reasonable doubt from the evidence in the case that the conspiracy charged in the indictment was knowingly formed and that the accused, or any of them, knowingly became members of the conspiracy, as charged, then the fact that a defendant may have believed in good faith that what was being done was not lawful would not be a defense.
>
> Intent may be proved directly or may be inferred from the surrounding circumstances.
>
> You may consider any statement made or done or omitted by a defendant and all other facts and

circumstances in evidence which indicate a defendant's state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts and statements knowingly done or knowingly omitted.

Tr. 3760.[5]

The jury acquitted one defendant and convicted the remaining nine. All nine appealed.

3. The defendants' briefs and argument on appeal took a new approach. Conceding that the court's charge complied with existing Sherman Act law, the defendants asserted that, as a result of the increase in antitrust penalties from a misdemeanor to a felony under the 1974 Antitrust Procedures and Penalties Act, due process considerations now required proof of specific intent "to restrain trade."

Although the precise contention had not been articulated in the district court, the court of appeals nonetheless addressed the argument and rejected it (Pet. App. A-7 to A-8 n.2). Noting that this Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), held that intent is an element to be proved in a

[5]The court also instructed:

The Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce. [Tr. 3753.]

The gist of the crime charged in the indictment is knowingly making or arriving at an agreement, or arrangement, or understanding, in unreasonable restraint of interstate trade and commerce; that is to say, what the law forbids is the act of knowingly becoming a party to or a member of conspiracies such as charged in the indictment. [Tr. 3759.]

Sherman Act offense, the court of appeals found that the government had sustained its burden. It held that where defendants are proved to have entered a conspiracy to submit collusive, noncompetitive rigged bids, conduct which constitutes a *per se* violation of the antitrust laws, proof of the intent to achieve the unlawful objective of the conspiracy is sufficient; the government need not additionally prove that the defendants intended to restrain trade or commerce (Pet. App. A-8 to A-9).

ARGUMENT

The decision of the court of appeals is correct. It is consistent with all other decisions that have interpreted *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), and there is no reason for this Court to address the intent element again in the absence of a conflict.

1. The district court correctly declined to give the instruction that defendants proffered, which would have required the jury to find "specific intent," *i.e.* that "the defendant knowingly did an act which the law forbids, purposely intending to violate the law" (Pet. App. A-7), before it could convict. A specific intent to violate the law has never been deemed to be an element of a Section 1 violation. As this Court held in *Gypsum*, "[a] requirement of proof not only of [the] knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." 438 U.S. at 446. See also *United States* v. *Gillen*, 599 F. 2d 541, 550 (3d Cir. 1979) (Adams, J., concurring) (Pet. App. B-19), pet. for cert. pending, No. 79-58. "Specific intent" need not be proved in Sherman Act cases. The

district court's "general intent" instruction thus accurately stated the law.[6]

2. Responding to contentions raised for the first time on appeal, the court of appeals also held that, once the government proved that the defendants entered into a conspiracy with the intent to rig bids and allocate markets (conduct long held to be illegal *per se* under the Sherman Act), it was unnecessary to prove that the defendants had an additional intent to restrain trade (Pet. App. A-6). This question has not been preserved for resolution here because no appropriate instruction was proffered to the district court. Fed. R. Crim. P. 30, 51. In any event, however, the court of appeals properly held that there is

[6]Petitioners conceded on appeal that the district court's instruction complied with pre-1974 Sherman Act law on intent. They maintained, however, that the 1974 Antitrust Procedures and Penalties Act, which changed the violation from a misdemeanor to a felony, required that a new element of intent be read into the Act. This argument was correctly rejected by the court of appeals (Pet. App. A-7). Accord, *United States* v. *Continental Group, Inc.*, Nos. 78-2328, 78-2330 to 78-2332 (3d Cir. July 20, 1979); *United States* v. *Foley*, 598 F. 2d 1323 (4th Cir. 1979), pet. for cert. pending, Nos. 78-1737 and 78-1838; *United States* v. *Noll Manufacturing Co.*, 1977-2 Trade Cases para. 61,712 (N.D. Cal. 1977). The legislative history of the 1974 amendments confirms that when Congress increased the penalties it did not change settled law regarding the elements of the offense. See, *e.g.*, 120 Cong. Rec. 36340 (1974) (remarks of Rep. Hutchison). Indeed, the criminal law rarely requires proof of a specific intent to violate the law; "ignorance of the law is no excuse." *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971). Thus, the only portion of the trial court's charge to which petitioners specifically object (Pet. 3, 5) is in fact a correct statement of the law. At all events, it is unlikely that a "specific intent" instruction could have made a difference in this case because it was undisputed that the defendants executed affidavits certifying that they had not acted collusively in submitting bids (Pet. App. A-6 n.1). The defendants' affidavits established their awareness of the law's requirements.

no need to prove a separate "intent to restrain trade." Petitioners' arguments—which attempt to present the "specific intent" point in slightly different guise—have been rejected by every court that has addressed them after *Gypsum*. *United States* v. *Continental Group, Inc.*, Nos. 78-2328, 78-2330 to 78-2332 (3rd Cir. July 20, 1979); *United States* v. *Gillen*, *surpa*; *United States* v. *Foley*, 598 F. 2d 1323 (4th Cir. 1979), pets. for cert. pending, Nos. 78-1737 and 78-838.

This case involves conduct long recognized to be in the category of *per se* offenses. Price fixing, horizontal market allocation, and bid rigging schemes are so clearly anticompetitive that no elaborate inquiry need be taken into the actual effects of the conspiracy or the possible beneficial motives of the defendants.[7] Proof that defendants intended to engage in bid rigging is tantamount to proving, not only that defendants knew of the anticompetitive effects of their conduct, but also that they had the purpose of imposing such effects on the marketplace. The reason for having *per se* rules is in part

[7]*Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899); *United States* v. *Topco Associates*, 405 U.S. 596 (1972); *United States* v. *Flom*, 558 F. 2d 1179, 1183 (5th Cir. 1977); *United States* v. *Champion International Corp.*, 557 F. 2d 1270 (9th cir.), cert. denied, 434 U.S. 938 (1977); *United States* v. *Finis P. Ernest, Inc.*, 509 F. 2d 1256 (7th Cir.), cert. denied, 423 U.S. 874, 893 (1975).

Although petitioners do not and could not contend that their conduct does not fall within the *per se* category of offenses, they imply that their conduct is "morally neutral" and not blameworthy (B-K Pet. 8). But for almost a century Congress and the courts have expressly held otherwise. It is not only this long line of precedent that served notice to petitioners that their conduct violated the law; they had actual notice of the illegality of their conduct. At the time they submitted their collusive bids they executed an affidavit, required by Illinois and federal law, stating that they had not entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding (Pet. App. A-6 n.1).

to avoid any necessity to inquire behind the fact of agreement to do something deemed overwhelmingly likely to be harmful to competition.[8]

Contrary to petitioners' assertions (B-K Pet. 5-8), this does not mean that *per se* offenses are "strict liability" crimes. The prosecution was required to prove, and did prove, that the defendants intentionally entered into a conspiratorial agreement, by which the defendants agreed to do things that are unlawful *per se*. This is the same standard of proof that is applied in ordinary conspiracy cases; a case is made out, for example, by proof that the defendants intentionally entered into a conspiracy to rob a bank. The prosecutor need not augment proof of the intentional agreement with proof that the defendants intended to harm the banking system or individual depositors. Price fixing and market division are unlawful *per se* in exactly the way bank robbery is unlawful, and the intent element of the conspiracy offenses thus should be the same. As the Third Circuit explained in *United States* v. *Gillen*, *supra*, 599 F. 2d at 545 (Pet. App. B-9), " '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' Thus, the conscious object of every price-fixing conspiracy is an illegal act." Where defendants have acted with an intent to rig bids, "questions of knowledge of probable consequences and indeed of 'conscious object' appear clearly answered." *Id.* at 546 (Pet. App. B-9). Similarly, as the court of appeals explained here,

[8]In other words, to argue that *Gypsum* requires an additional instruction regarding subjective intent to restrain trade (or subjective knowledge that price fixing or market allocation is an unreasonable restraint of trade) is to argue that *Gypsum* demands abandonment of the *per se* rule in criminal cases. *Gypsum* offers no hint of such a drastic change in law, however. In fact, it expressly noted the application of the *per se* rule to certain well-defined categories of cases. 438 U.S. at 440-441.

" '[s]ince the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: "An agreement among competitors to rig bids is illegal" ' " (Pet. App. A-9). By intentionally rigging bids "the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment." *Gypsum*, *supra*, 438 U.S. a 445.

Petitioners' reliance on this Court's decision in *Gypsum* (B-K Pet. 4-7) is unwarranted. The instruction at issue in *Gypsum* directed the jury to presume that defendants had an unlawful intent if it found that their conduct produced anticompetitive effects. This " 'effects alone' test" made defendants' purpose irrelevant and rendered the Sherman Act a "strict liability" statute for equivocal business activity that might only after the fact be found to be anticompetitive. Here, by contrast, the jury was instructed that it could not convict unless it found that the defendants had knowingly and intentionally formed or joined a conspiracy for the purpose of rigging bids. Once this purpose was established, the jury was told, it need not inquire into the actual effects of the bid rigging scheme, because as a matter of law bid rigging is treated as having anticompetitive effects (Tr. 3754-3755). That is what it means for bid rigging to be unlawful *per se*. Thus, rather than presuming an unlawful purpose from the fact of anticompetitive effects, as in *Gypsum*, the jury here was told that its primary function was to determine the existence of an unlawful purpose or intent. Furthermore, the jury was told (Tr. 3760) that it could find this intent, not on the basis of a conclusive presumption derived from the effects of the challenged conduct (as in *Gypsum*), but

only from the defendants' conduct (Tr. 3760; emphasis added):[9]

> Intent may be proved directly or may be inferred from the surrounding circumstances.
>
> * * * * *
>
> You *may* consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts and statements knowingly done or knowingly omitted.

This instruction was legally sound; in *Gypsum* this Court expressly recognized that a jury instruction that allows intent to be inferred is unobjectionable even where the inference is drawn solely from an effect on price. 438 U.S. at 446.[10]

3. The court of appeals correctly rejected petitioners' claim that the use of Peter Palumbo's and Robert Madden's compelled testimony against their respective corporations violated their Fifth Amendment rights. Both witnesses were immunized from prosecution pursuant to

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[9]Unlike the situation before this Court in *Gypsum*, *supra*, and *Sandstrom* v. *Montana*, No. 78-5384 (June 18, 1979), the jury was not required to find intent. It was simply informed of its discretion to infer one fact from the existence of others. See *Sandstrom*, *supra*, slip op. 4 n.4.

[10]Even if it were necessary to prove an intention unreasonably to restrain trade, the charge here met any such requirement. The jury was told:

> To convict a defendant of this crime the Government must prove beyond a reasonable doubt that he was a member of a conspiracy whose purpose was to effect an unreasonable restraint on interstate or foreign commerce.

Pet. App. A-5; Tr. 3751. Thus, the jury must have concluded that defendants joined a conspiracy with the purpose, *i.e.*, the "conscious object," to restrain trade. *Gypsum*, *supra*, 438 U.S. at 444 & n.21.

18 U.S.C. 6002, which affords immunity that is coextensive with the scope of the privilege against self-incrimination. *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). That statute was not violated because Palumbo's and Madden's immunized testimony was used against their respective corporations, rather than against them personally. See *Hale* v. *Henkel*, 201 U.S. 43, 67 (1906).

Petitioners' contention that the statute as well as their Fifth Amendment rights were violated because "the defendant company is indistinguishable from the individual who heads it" (PMC Pet. 7) is contrary to settled law. Corporations historically have been regarded as entities separate and distinct from natural persons, including their officers and stockholders. *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932); *Flink* v. *Paladini*, 279 U.S. 59, 63 (1929). The constitutional privilege against self-incrimination is a purely personal one; it cannot be used by or on behalf of a corporation. *United States* v. *Kordel*, 397 U.S. 1, 7 & n.9 (1970); see also *Bellis* v. *United States*, 417 U.S. 85, 100 (1974); *United States* v. *White*, 322 U.S. 694, 698-701 (1944). This principle is as true for closely held, small corporations as it is for large corporations. *Grant* v. *United States*, 227 U.S. 74, 80 (1913).[11]

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[11]Petitioners' complaint that Palumbo and Madden "will pay the fines and the companies that bear their names are branded with felony convictions" (PMC Pet. 9) is unavailing because the privilege against self-incrimination has no application where a danger of criminal prosecution is not present. The privilege does not gurantee protection against social or economic sanctions. *Hale* v. *Henkel*, *supra*, 201 U.S. at 66-67; *Brown* v. *Walker*, 161 U.S. 591, 609-610 (1896); *Ullmann* v. *United States*, 350 U.S. 422, 430-431 (1956); *In re Bonk*, 527 F. 2d 120, 124 (7th Cir. 1975).

Therefore, since Palumbo and Madden were immunized pursuant to 18 U.S.C. 6002 and their immunized testimony was used against their respective corporations and not against them, their Fifth Amendment rights were not violated.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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